# INDEX


| | Page. |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Summary of argument | 9 |
| Argument: | |
| I. The court of appeals' collateral consideration of the lawfulness of the tariff amendment improperly intruded upon the Commission's primary jurisdiction and the exclusive procedures for direct judicial review | 14 |
| A. The Commission had primary jurisdiction over the question whether prior administrative approval of the tariff amendment was required | 16 |
| B. The reference to the Commission resulted in final orders reviewable exclusively by the filing of timely petitions for review under the Administrative Orders Review Act | 18 |
| C. The court of appeals erroneously refused to honor the Commission's decision in this case | 23 |
| II. The tariff amendment changing the incidence of strike storage charges was within the scope of the basic conference agreement and did not require prior approval by the Commission under Section 15 | 30 |
| A. Conventional changes in tariffs and related regulations pursuant to an approved basic conference agreement do not require separate approval as "agreements" or "modifications" | 31 |
| B. The Commission's decision that Terminals' tariff amendment was within the scope of the approved conference agreement was reasonable and should therefore have been upheld | 37 |




397-770—70——1

Page

C. The Commission's decision in this case was not undermined by *Volkswagenwerk* ..... 40
Conclusion ..... 43
Appendix A ..... 45
Appendix B ..... 53

## CITATIONS

**Cases:**

*Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 235 ..... 17, 35, 36, 37-38
*Agreement No. 9025, Dockage Agreement*, 8 F.M.C. 381 ..... 34
*Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 ..... 17
*Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 ..... 20, 37
*Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.*, 9 F.M.C. 563 ..... 36
*D. L. Piazza Co.* v. *West Coast Line, Inc.*, 113 F. Supp. 193, affirmed, 210 F. 2d 947, certiorari denied, 348 U.S. 839 ..... 21
*El Dorado Oil Works* v. *United States*, 328 U.S. 12 ..... 19
*Empire State Highway Transp. Ass'n.* v. *American Export Lines*, 5 F.M.B. 565 ..... 33, 40
*Empire State Highway Transp. Ass'n.* v. *Federal Maritime Board*, 291 F. 2d 336, certiorari denied, 368 U.S. 931 ..... 32-33, 34, 35, 36, 40, 41
*Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 12-1 ..... 33
*Far East Conference* v. *United States*, 342 U.S. 570 ..... 18, 21-22, 37
*Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 ..... 38
*Free Time and Demurrage Practices at New York Harbor*, 11 F.M.C. 238 ..... 38
*Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 ..... 25
*Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 ..... 19, 22
*Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 ..... 38

Page

Cases—Continued

*Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, certiorari denied, 347 U.S. 990 ..... 36
*Montship Lines, Limited* v. *Federal Maritime Board*, 295 F. 2d 147 ..... 19
*North Atlantic Westbound Frt. Ass'n.* v. *Federal Maritime Commission*, 397 F. 2d 683 ..... 38
*Oling* v. *Airline Pilots Ass'n.*, 346 F. 2d 270 ..... 25
*Pacific Coast Port Equalization Rule*, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 ..... 35, 36
*Pacific Coast European Conference—Payment of Brokerage*, 4 F.M.B. 696, order enlarged on rehearing, 5 F.M.B. 65, and made permanent, 5 F.M.B. 225 .. 36
*Pennsylvania R. Co.* v. *United States*, 363 U.S. 202 .... 19
*Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, affirmed *sub nom. California* v. *United States*, 320 U.S. 577 ..... 38
*Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 ..... 19
*Safir* v. *Gibson*, C.A. 2 No. 34355, decided February 26, 1970, rehearing denied June 18, 1970 ..... 25
*Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 ..... 17
*Swayne & Hoyt Ltd.* v. *United States*, 300 U.S. 297 ... 37
*Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 ..... 37
*Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387, certiorari denied, 397 U.S. 910 ..... 17
*Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 ..... 38
*Trans-Pacific Frt. Conf.* v. *Federal Maritime Commission*, 314 F. 2d 928 ..... 38
*United States* v. *Western Pacific R. Co.*, 352 U.S. 59 .. 25–26
*United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 ..... 37
*Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261 ..... 7, 12, 14, 15, 16, 18, 19, 26, 27, 28, 31, 36, 40–41, 42
*Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 ..... 17

Statutes, rules and regulations: Page
Administrative Orders Review Act of 1950, 64 Stat. 1129, reenacted and recodified in 1966 as 28 U.S.C. 2341, *et seq.* (1964 ed., Supp. IV), 80 Stat. 621–24 .. 2, 6, 11, 15, 20
28 U.S.C. 2341 .. 45
28 U.S.C. 2342 .. 21, 45
28 U.S.C. 2343 .. 46
28 U.S.C. 2344 .. 21, 46
28 U.S.C. 2347 .. 47
28 U.S.C. 2348 .. 21, 48
28 U.S.C. 2349 .. 21, 49
28 U.S.C. 2350 .. 50
Federal Maritime Commission Rules of Practice and Procedure:
Rule 1(j) (46 C.F.R. 502.10) .. 28
Rule 16(a) (46 C.F.R. 502.261) .. 28
General Order 15 (46 C.F.R. 533) .. 34
Shipping Act, 46 U.S.C. 801, *et seq.*:
Section 15 .. 2, 3, 5, 9, 10, 11, 13, 14, 16–17, 18, 31, 32, 34, 35, 39, 41, 42, 43, 51
Section 16 .. 39, 42
Section 17 .. 6, 39, 42
Section 18(b) .. 34
Section 29 .. 20
Section 30 .. 20
Section 31 .. 20
Urgent Deficiencies Act, 38 Stat. 208, 220 .. 20
Miscellaneous:
28 U.S.C. 1336(f) .. 22
Annual Reports of the Federal Maritime Commission:
1968 .. 32
1969 .. 32
Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess .. 35
H. Rep. 498, 87th Cong., 1st Sess .. 35
S. Rep. 860, 87th Cong., 1st Sess .. 35

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL., PETITIONERS

*v.*

REDERIAKTIEBOLAGET TRANSATLANTIC

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION AS AMICI CURIAE

### OPINIONS BELOW

The opinion of the court of appeals (App. I, 46–51)[1] is reported at 420 F. 2d 419; that of the district court (App. I, 40–43) is unreported. The opinion of the Federal Maritime Commission (App. II, 49–65) is reported at 10 F.M.C. 409.

### JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970 (App. I, 52). The petition for a writ of certiorari was filed on February 27, 1970, and

[1] "App. I" and "App. II" refer to the two volumes of the Appendix in this Court, which are separately paginated.

was granted on April 20, 1970 (App. I, 53). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, in the exercise of its primary jurisdiction on reference from a district court entertaining private litigation, must be followed in the district court action when there has been no recourse to the exclusive direct review procedures provided by the Administrative Orders Review Act.

2. If the merits of the Commission's determination were properly examined below, whether (as the Commission determined) a tariff amendment shifting the incidence of strike storage charges from cargo to vessel was within the scope of the conference agreement previously approved by the Commission and therefore did not require specific prior approval.

## STATUTES INVOLVED

Pertinent sections of the Administrative Orders Review Act (28 U.S.C. 2341–2352), and portions of Section 15 of the Shipping Act, 46 U.S.C. 814, are set forth in appendix A to this brief, *infra*, pp. 45–52.

## STATEMENT [2]

The Port of Boston Marine Terminal Association ("Terminals") is a conference of marine terminal operators which operates pursuant to Agreement

[2] As discussed more fully in our Memorandum in support of the petition for a writ of certiorari (pp. 2–3), the United States and the Federal Maritime Commission are interested in this private litigation because the decision below raises serious

No. 8785 approved in 1962 by the Federal Maritime Commission under Section 15 of the Shipping Act, 46 U.S.C. 814.[3] The terminal operators are an intermediate link in the transportation chain between carriers, on the one hand, and shippers or consignees, on the other. They perform some services for the carriers and other services for the shippers or consignees. One such service is to furnish a place to store cargo deposited on the wharf for a period of time reasonably necessary for the consignee to remove it. Since the carrier's transportation obligation is deemed to include the furnishing of this service it is done by the terminal operator for the account of the carrier. Five days (excluding Saturdays, Sundays, and holidays) is the period deemed reasonably necessary in the Port of Boston for the consignee to remove import cargo[4] and is known as "free time." Cargo left on the wharf beyond the free time period is held for the account of the consignee, and is assessed a daily storage charge called "wharf demurrage." (App. II, 57–62.)

The Agreement, which relates generally to "rates * * * and charges * * * for furnishing * * * terminal facilities in the Port of Boston * * *" (App. II, 5), provides for joint action by the members of terminals with respect to wharf demurrage and "all

questions concerning judicial review of orders of the Commission and other agencies and concerning the administration of the Shipping Act.

[3] The Agreement is set forth in full at App. II, 5–10.

[4] There are exceptions to this five-day rule that are not pertinent here.

services, facilities, rates, and charges incidental thereto * * *" (Art. Third, App. II, 6). It contemplates the filing of a tariff by the Association with respect, *inter alia*, to wharf demurrage, and requires each member to adhere thereto (Art. Seventh, App. II, 8). In general, the Agreement requires members to file promptly with the Commission their "tariffs, rates, charges, classifications, rules and regulations * * * and any changes therein * * *" (Art. Sixth, App. II, 7).

Following Commission approval of the Agreement in 1962, Terminals filed with the Commission a tariff of agreed rates, charges, and related regulations. With respect to wharf demurrage, cargo remaining on the pier beyond the free time would be assessed a daily charge of 2½ cents per hundred pounds. When factors beyond the control of the shipper or consignee, such as a longshoreman's strike, prevented cargo removal, wharf demurrage would be assessed against the cargo at the reduced rate of 1 cent per hundred pounds (App. II, 52).

In 1964, Terminals revised the tariff so as further to reduce this latter charge, renamed "strike storage," to ½ cent per hundred pounds and to shift the incidence of liability for this charge from the shipper or consignee (the cargo) to the carrier (the vessel). No charge would be assessed when removal was prevented by a strike of terminal employees (App. II, 43, 46, 54–55). The charge would, however, be assessed in the event of a strike by longshoremen, who are employees of stevedoring companies operating under contracts with the vessel owners (see App. I, 38).

When a longshoremen's strike occurred in 1965 and several vessels refused to pay the charge for the resulting strike storage as provided in the amended tariff, Terminals brought an action for damages and declaratory relief against Boston Shipping Association ("Shipping"), an organization representing various vessel owners and agents for vessel owners.[5] The district court (to which the action was removed from the State court where it had been filed) decided that the Commission had primary jurisdiction to determine the issues, raised by Shipping as defenses, concerning the lawfulness and reasonableness of the tariff amendment, and stayed its proceedings to allow Shipping an opportunity to obtain the Commission's ruling on these issues (App. I, 23–24).

Shipping thereupon filed a complaint with the Commission. After full evidentiary hearing and oral argument, the Commission on June 23, 1967 issued a report (App. II, 49) and order (*id.*, 65–66) sustaining the validity of Terminals' tariff amendment under the Shipping Act in all respects here relevant. It held that the amendment shifting the strike storage charge from the cargo to the vessel was within the scope of Terminals' Agreement No. 8785, which had already been approved by the Commission, and so was effective without additional prior approval by the Commission as a new agreement or modification under Section 15 of the Shipping Act (*id.*, 55–57). The Commission further held that it was not an unrea-

[5] Also named as defendants were the members of Shipping, including Furness, Withy & Co., Ltd. (App. I, 9–10), which was respondent's agent at the Port of Boston (*id.*, 26).

sonable practice, within the meaning of Section 17 of the Shipping Act (46 U.S.C. 816), for such charge to be assessed against the vessel for cargo still in "free time" when the strike in question began, that is, cargo as to which the vessel had not fully discharged its transportation obligation (*id.*, 57–59).[6]

Shipping's petition for review of the Commission's order filed on September 19, 1967, more than three weeks after expiration of the sixty-day limit specified in the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*), was dismissed as untimely by the Court of Appeals for the District of Columbia Circuit on March 18, 1968 (App. II, 67). That court also denied a subsequent petition for rehearing (*id.*, 68).

On September 4, 1968, the respondent here, Rederiaktiebolaget Transatlantic ("Transatlantic"),[7] one of

[6] The Commission ruled that the common carrier's transportation obligation does not end with the deposit of the cargo on the pier. The carrier must also arrange for the consignee to have access to the cargo and sufficient time, *i.e.*, "free time", to remove it. The carrier may contract, as it has in Boston, to have these services performed by a terminal operator, but the obligation remains that of the carrier (App. II, 57–59).

Although the Commission determined that it was not unreasonable for Terminals to assess the strike storage charge against the vessel for cargo which, when the strike began, was still in free time, it held that it was unreasonable to do so as to cargo which was no longer in free time (*id.*, 60–63). The latter aspect of the Commission's decision was not in issue in the district court litigation, since the relevant cargo was still in free time when the strike began.

[7] In our memorandum as *amici curiae* supporting the petition, we referred to respondent as "Swedish", in accordance with the common reference to it as Swedish Transatlantic Line. To avoid confusion, we here use the terminology adopted in petitioner's brief.

the carriers against which strike storage charges had been assessed, petitioned the Commission for reconsideration of its decision, insofar as it held that the tariff amendment was not subject to the prior filing requirement. The petition contended that the decision was inconsistent with this Court's intervening decision on March 6, 1968, in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261 (App. II, 69). Although this was Transatlantic's first participation in this matter in its own name, it specifically claimed, in support of its status as a party eligible to petition, that it had been represented by its agent in the Commission proceedings.[8] The petition was returned as untimely under the Commission's Rules of Practice and Procedure (*id.,* 77). Transatlantic sought no direct judicial review of this action and did not attack it as such below.

Instead, Transatlantic moved for leave to intervene as a defendant in the resumed district court proceedings so as to assert the merits of the argument it sought to present to the Commission (App. I, 26). In support of its motion, it alleged inadequate representation of its interest by its agent (Furness, Withy & Co.) and its liability for a substantial part of peti-

[8] Transatlantic's petition for reconsideration stated that "[i]t is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of * * * Shipping * * * which, with its member lines, filed the complaint in this proceeding [before the Commission]" (App. II, 69). The petition further stated that Terminals claims the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions" (*id.,* 70).

tioner's judgment against Furness, Withy (*id.*, 27-28, pars. 5, 9).[9] It acknowledged not only that it had petitioned the Commission for reconsideration in its own name and by its own counsel, but also that "at all times prior thereto [it] had been represented by counsel for Furness, Withy * * *." (*Id.*, 27, par. 7.) On April 16, 1969, the district court granted the motion to intervene (*id.*, 29).

The district court thereafter rendered judgment against all the defendants (*id.*, 43). After noting that the defendants had not sought timely direct review of the Commission's order and that Transatlantic had sought no review of the Commission's denial of its petition for reconsideration (*id.*, 42), Judge Wyzanski ruled as follows (*ibid.*):

> The matters presented by the complaint are within the primary jurisdiction of the F.M.C. If defendants were not content with the determination of the F.M.C. it was incumbent on them to intervene and to appeal seasonably to the appropriate United States Court, here the Court of Appeals of the District of Columbia. This Court is not the appropriate tribunal to review directly or indirectly the F.M.C.
>
> Even if this Court did undertake a review, it could set aside or ignore the determinations of the F.M.C. only if they were without substantial evidentiary basis, or contrary to the statute

[9] The judgment against Furness, Withy was for the undisputed amount of $10,709 (App. I, 44) and Transatlantic had alleged that it would be required to reimburse Furness, Withy in the amount of $8,155 (*id.*, 27). Transatlantic further alleged specifically that a judgment against Furness, Withy "will be binding on Transatlantic" (*id.*, 28).

or the Constitution. Here the F.M.C. had adequate evidence. Its interpretation of the statute it administers reflects not merely expertness developed from familiarity but a construction that is in accord with what this Court deems a correct understanding of the statute.

Transatlantic alone of the defendants appealed. Concluding that Transatlantic was not "bound" by the Commission's decision, apparently because it viewed Transatlantic as a "non-party" to the Commission proceedings, the Court of Appeals for the First Circuit, per Chief Judge Aldrich, reversed on the basis of a *de novo* consideration of the merits. Reasoning that *Volkswagenwerk, supra,* had undermined the basis of the Commission's decision, the court held that Terminals' tariff amendment was invalid because it was a "modification" of a Section 15 agreement and had not received the Commission's specific prior approval (*id.*, 49–50). Accordingly, the court of appeals directed the district court to enter a judgment for Transatlantic.

## SUMMARY OF ARGUMENT

In deciding that Terminals' tariff amendment was invalid because it had not been filed with the Commission under Section 15 of the Shipping Act, the court of appeals erred in two separate respects: First, the district court (and therefore the court of appeals on review) was precluded from considering the merits of this question because it was a matter for the Commission to decide in the exercise of its primary jurisdiction and the exclusive statutory procedures for direct judicial review of the Commission's decision of

the matter (on reference from the district court) had not been followed. Second, even if the court of appeals did properly reach the merits of the Section 15 question, it decided that question erroneously.

## I

The district court was correct in referring to the Commission—for decision in the exercise of its primary jurisdiction—the question whether the tariff amendment changing the incidence of the charge for cargo storage during a strike amounted to a new "agreement * * * or modification * * * thereof" within the meaning of the Section 15 filing requirement. The question involves matters at the heart of the Commission's regulatory scheme, and therefore familiar principles required that the agency pass upon it in the first instance.

The Commission's decision on reference from the district court resulted in an order subject to direct judicial review under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.*, having determined a "right or obligation" with direct legal consequences. Further, the Administrative Orders Review Act provided the *exclusive* route for judicial review of the Commission's decision, barring any collateral review in the district court. This is shown not only by examination of the explicit language of the Act but also by consideration of the effect that collateral review in a private action (as here) would have on the statutory scheme: It would be inconsistent with the time limitations upon review and with the requirement that the Commission and the United States be parties, and

could lead to the anomalies of state-court review and review under circumstances that would affect only some, and not all, persons covered by the Commission's order.

Application of these principles of primary jurisdiction and judical review shows the error of the court of appeals' approach and the correctness of the district court's acceptance of the Commission's decision. It is not clear whether the court of appeals regarded the district court (and itself) as free to decide the Section 15 question *de novo* or whether it thought that collateral review was available in the district court action; either approach, however, would be incorrect. To the extent that the court of appeals relied upon the proposition that Transatlantic (the appellant before it) had not been a "party" in the Commission's proceedings on reference, the record shows that proposition to be unsupportable; Transatlantic was in fact fully represented and thus would have no claim that fairness to it required a redetermination of the issues. In any event, there is nothing in the Administrative Orders Review Act that suggests that a non-party is any more entitled to collateral review than a party is, and the mere fact that a litigant in court may not have been a party on a prior reference to an agency does not in any way diminish the agency's primary jurisdiction. At the most, a new party would be entitled to a new reference to the agency, but that should not be necessary where the new party's factual situation is the same as that already considered by the agency; it is plain that the

same issue presented as to Transatlantic was specifically considered by the Commission in this case.

It may be argued that the intervention of this Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, between the Commission's order and the time when the district court was called upon to apply it undermined the continued validity of the Commission's decision. But again—except in the rarest of circumstances, which are not present here—a change in the applicable law could at most lead to a new reference to the agency for reconsideration, and would not justify either collateral review or a *de novo* court decision bypassing the agency's primary jurisdiction. In the circumstances of this case, no such further reference would have been in order because Transatlantic had already sought reconsideration directly from the Commission, and the Commission had determined that Transatlantic had not raised the alleged change in the law with due diligence. Having failed to seek judicial review (as it could have) of the Commission's rejection of its petition for reconsideration, Transatlantic could not reopen that question of due diligence collaterally and in any event has not adequately explained its delay in asserting its contention. Moreover, as we show in part II of the Argument, *Volkswagenwerk* plainly did not affect the applicable law in any manner that would even require reconsideration by the Commission, much less justify the court's reaching an opposite result on its own.

## II

If the Court disagrees with our submission in part I, it must then review the court of appeals' conclusion

as to the merits of the Section 15 question, which we submit was misguided. It has long been established that Section 15—despite its literal coverage of "every" agreement or modification thereof fixing or regulating rates—must be read as excluding conventional tariff changes contemplated by conference agreements (such as Terminals') that have already been approved by the Commission under Section 15; this has been legislatively recognized in an amendment to Section 15. Such an exclusion is necessary to avoid disruption of the regulatory scheme and intolerable delays in the implementation of many of the thousands of tariff changes filed by conferences with the Commission every year. A line must, of course, be drawn between conventional tariff changes contemplated by approved conference agreements and new types of concerted activity not contemplated by those basic agreements, which should receive prior Commission approval. Whether a particular matter is within the contemplation of an approved conference agreement for purposes of Section 15 is a question for the Commission to decide in each instance in the light of its expert knowledge of industry practices and in the context of its own approval of the underlying conference agreement. In this case, the Commission did consider the matter and concluded that a change in the incidence of strike storage charges was the kind of tariff change contemplated in the provision of Terminals' basic conference agreement for the fixing of wharf demurrage charges. That conclusion was sound and should have been accepted by the court below.

397-770—70——3

The correctness of the Commission's conclusion was not undermined by this Court's subsequent *Volkswagenwerk* decision. The question there was whether an agreement between carriers and terminal operators relating to labor welfare costs had to be filed with the Commission at all, when there was no underlying agreement among the parties that had been approved by the Commission; thus, the question was whether Section 15 required any kind of Commission supervision of the subject matter of that agreement. In contrast, the tariff amendment here in question was directly contemplated by the approved Terminals agreement and had been filed with the Commission pursuant to the normal procedures relating to supervision of tariffs. The applicability of Section 15 to such tariff changes was not involved in *Volkswagenwerk,* and thus that decision did not affect this case.

## ARGUMENT

### I. THE COURT OF APPEALS' COLLATERAL CONSIDERATION OF THE LAWFULNESS OF THE TARIFF AMENDMENT IMPROPERLY INTRUDED UPON THE COMMISSION'S PRIMARY JURISDICTION AND THE EXCLUSIVE PROCEDURES FOR DIRECT JUDICIAL REVIEW

The court of appeals held that the district court should have decided—as to Transatlantic—whether or not prior administrative approval of the tariff amendment in question was required under Section 15 of the Shipping Act, and that it should have done so without regard to the actual decision that the Commission had just made on this very question on reference from the district court. The court

of appeals acknowledged a single possible obstacle to such a de novo determination by the district court, apparently conceding that Transatlantic would have been bound by the Commission's decision if it had been a "party" to that proceeding; it found, however, that Transatlantic had not been such a "party" and therefore, unlike the other defendants who were members of Shipping, was in no way bound by the Commission's determination of the past obligations created by the tariff.

In our view, this approach was wrong because it improperly ousted the Commission of its primary jurisdiction under the Shipping Act, which carries with it an exclusive scheme for direct review of FMC orders under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.* The district court had properly referred this very question to the Commission, and had no authority either to ignore or to review the Commission's decision. If—as the court of appeals apparently felt—the Commission's decision was called into question by this Court's subsequent decision in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, that was no excuse for totally ignoring the Commission's decision; at the very least, the Commission should have the opportunity to reconsider. And neither the district court nor the court of appeals on review of the district court had jurisdiction to give plenary review to the Commission's decision; rather, such review had been available only by way of a timely petition for direct review of the Commission's order in a court of appeals pursuant to the

exclusive procedures established in the Administrative Orders Review Act.

Moreover, as we shall show, the conclusion below that Transatlantic was not a "party" to the proceedings before the Commission is inconsistent with the undisputed facts of record. Thus, whatever the situation might be as to one who had no opportunity to argue his case before the agency, Transatlantic has no grounds for avoiding the effects of the Commission's decision and the failure of the vessel owners to seek timely direct review of that decision. And Transatlantic cannot now make any special claim based on the intervening *Volkswagenwerk* decision, having been untimely in its efforts to seek reconsideration by the Commission on this very ground, and having failed to seek judicial review of the Commission's rejection of those efforts.

Accordingly—although we argue in part II of the Argument that the Commission's conclusion on the merits was correct and is unimpaired by *Volkswagenwerk*—we believe that the Court need not consider the merits of the Section 15 question in order to reverse the decision of the court of appeals and reinstate the judgment of the district court.

### A. THE COMMISSION HAD PRIMARY JURISDICTION OVER THE QUESTION WHETHER PRIOR ADMINISTRATIVE APPROVAL OF THE TARIFF AMENDMENT WAS REQUIRED

As part II of the Argument indicates, the question whether Terminals' decision to change the incidence of the strike storage charge amounted to a separate "agreement * * * or modification * * * thereof" subject to the filing requirement of Section 15 of the Shipping

Act (46 U.S.C. 814) is a question of both intricacy and great administrative importance. It involves interpretation of the technical statutory language (which *inter alia*, exempts "tariff rates, fares, and charges, and * * * regulations explanatory thereof * * * agreed upon by approved conferences * * *") in the light of the Commission's fundamental regulatory responsibilities and capabilities, which are broadly affected by the answer given. Such questions as to an administrative agency's scope of authority—though legal questions—have been recognized as questions upon which the agency affected should be allowed to pass in the first instance, that is, questions as to which the courts should defer to the agency's primary jurisdiction, subject only to judicial review. See, *e.g.*, *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 424–425; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220–223; *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177–178; *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387, 402–404 (concurring opinion) (C.A. 5), certiorari denied, 397 U.S. 910. In a related situation, a court of appeals has held that the FMC "is the properly constituted body to scrutinize the conference action and to determine initially upon which side of the line [*i.e.*, whether within or without an approved basic agreement] the conference action falls * * * taking into account the practicalities of the marketplace and the decisional law on the question from the courts and Commission." *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 339–340 (C.A.D.C.). This Court has explained:

> * * * [B]y preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure * * * [u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised * * *. [*Far East Conference* v. *United States,* 342 U.S. 570, 574–575.]

Thus, there can be no doubt of the propriety—and indeed legal necessity—of the district judge's original decision to refer the Section 15 question to the Commission for its decision. In so doing, he followed precisely the pattern followed in *Volkswagenwerk,* upon which the court below relied primarily for its decision; in *Volkswagenwerk,* the district court in which a suit for recovery of certain charges had been brought referred the question of the lawfulness of those charges to the FMC, and this Court's decision came on direct review of the Commission's decision (while the original district court action remained in abeyance). The question that remains, therefore, is what effect the district court should have given to the agency decision resulting from the reference in the circumstances of this case.

B. THE REFERENCE TO THE COMMISSION RESULTED IN FINAL ORDERS REVIEWABLE EXCLUSIVELY BY THE FILING OF TIMELY PETITIONS FOR REVIEW UNDER THE ADMINISTRATIVE ORDERS REVIEW ACT

The Commission's Report on the complaint filed with it by Shipping following the district court's reference decided, with extensive reasoning, that the

Association's tariff was lawful as to strike storage commencing in "free time" but not as to strike storage beginning later. The resulting agency Order declared that the tariff should accordingly be amended in part but was otherwise enforceable, in particular in the context presented by the present legislation. Thereby the Order plainly determined a "'right or obligation' so that 'legal consequences' will flow therefrom [and was] * * * judicially reviewable" under familiar principles. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 602; *Pennsylvania R. Co.* v. *United States*, 363 US 202, 205; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143. The fact that the Commission's actions were taken pursuant to court referral did not make them, as Transatlantic unsuccessfully contended before the district court, "advisory" only, and thus deprive them of the finality needed for judicial review. "Such review 'is equally available whether [the Commission's] * * * proceeding follows referral by a court or originates with the Commission.'" *Atlantic Coast Line, supra*, 383 U.S. at 602; *Pennsylvania R. Co., supra*, 363 U.S. at 205; *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18–19. See also *Volkswagenwerk, supra*, 390 U.S. at 266–268.

The Commission's order denying Transatlantic's petition for reconsideration based upon *Volkswagenwerk* was equally subject to direct judicial review. See *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 151 (C.A.D.C.).

The express language of the statutory review scheme governing orders of the Federal Maritime Commission further leaves no room for doubt that the Commission's decisions incorporated in these orders were reviewable *exclusively* by the filing of timely petitions for review under the Administrative Orders Review Act. Section 31 of the Shipping Act (46 U.S.C. 830) stated (and still states) that "except as herein otherwise provided" the procedures governing suits to "enforce, suspend, or set aside, in whole or in part, any order of the [Commission]"[10] shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission.[11]

The procedures for district court review under the Urgent Deficiencies Act (38 Stat. 208, 220) thus incorporated in the statute have been superseded, however, by the Administrative Orders Review Act of 1950, 64 Stat. 1129 (reenacted and recodified in 1966 as 28 U.S.C. 2341, *et seq.* (1964 ed., Supp. IV), 80 Stat. 621–624), which thus now sets forth the procedure for review of FMC orders. See *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 612–614.

[10] The agency entrusted with the duty of administering the Shipping Act has undergone many reorganizations and concomitant name changes since the Act's creation in 1916. For the sake of simplicity the term "Commission" is used herein to include both the present maritime regulatory agency and its predecessors.

[11] The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), and relate solely to enforcement of Commission orders. Sections 29 and 30, respectively, provide for actions in the district courts by the Commission, the Attorney General or a private party to enjoin violations of Commission orders, and suits by private parties to enforce unsatisfied Commission reparation awards.

The Administrative Orders Review Act provides (28 U.S.C. 2342) that the several courts of appeals have "*exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Commission as are specified in Section 31 of the Shipping Act, *supra*. An order can be challenged only by the filing of a petition to review by a party aggrieved within 60 days after its entry (28 U.S.C. 2344); the action is against the United States (*ibid.*), and a copy of the petition must be served on the agency and the Attorney General by registered mail (*ibid.*). The Attorney General is given the responsibility for and control of the interests of the government in all court proceedings under the Act, and the agency is authorized to appear in the proceeding as a party and as of right (28 U.S.C. 2348). Finally, the court of appeals in which the record on review is filed is given the exclusive jurisdiction to make and enter "a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency" (28 U.S.C. 2349).

The express reference to "exclusive" court of appeals jurisdiction in the Administrative Orders Review Act leaves no room for doubt that the Commission is not subject to collateral judicial review in a district court or any other court. Thus, a party to a Commission proceeding is bound by the Commission's decision unless he pursues the statutory procedures for direct review in a timely fashion. *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839; see also *Far East Conference* v. *United States*,

342 U.S. 570, 577. More generally, it would be inconsistent with the entire statutory scheme to make Commission orders subject to any kind of collateral review, whether or not the order in question arises out of a reference by a court.[12] Collateral review long after the expiration of the time limit upon direct review, as in this case, does violence to the policies underlying that limitation. Moreover, it would be wholly inconsistent with the statutory requirements that the United States and the Commission be parties on review of Commission orders if such orders were also subject to review in private litigation without any official notification to the government or any government participation of right. Such collateral review, if it were available, would presumably also be available on the same theory in a state court; the present litigation began in a state court and would have stayed there had the defendants not elected to remove it to the federal district court. But there is no reason whatever to think that Congress ever intended that a state court should have general authority to review decisions of the Federal Maritime Commission and other federal agencies. Compare *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, 589–595, 605 n. 9. Finally, this very litigation illustrates another anomaly

[12] With respect to decisions of the Interstate Commerce Commission on reference from a district court or the Court of Claims, Congress has expressly provided for review by the referring court. 28 U.S.C. 1336(b). This provision, which was added by amendment in 1964, long after the Administrative Orders Review Act had come to govern FMC review, suggests that Congress would have expressly so provided in the case of the FMC (or the other agencies governed by that Act) if it had intended to allow such collateral review.

that would apparently flow from collateral review: Transatlantic, having appealed from the district court, is not bound by the Commission's decision, while the other parties in the district court, who did not appeal, apparently are bound; it would be incongruous that collateral review, with fortuitously limited parties, could completely obliterate the Commission's decision, as direct judicial review of course does. The anomalies we have described are especially significant when—as in this case—the agency decision in question relates to broadly applicable regulatory procedures fundamental to the agency's very reason for existence.

### C. THE COURT OF APPEALS ERRONEOUSLY REFUSED TO HONOR THE COMMISSION'S DECISION IN THIS CASE

We have shown that the lawfulness of Terminals' tariff amendment was a question within the primary jurisdiction of the Federal Maritime Commission—which considered it on a proper reference from the district court—and that the Commission's resulting order was reviewable only directly pursuant to the exclusive procedures of the Administrative Orders Review Act. It follows that the determination by the court below that the district court should have decided the question in a way contrary to the Commission's decision was in error, whether (as is not clear) the court considered that the district court and itself were free to decide the question *de novo* or that they should collaterally review the Commission's decision. If the former, the decision below violates the well established principles of primary jurisdiction; if the latter, it violates the exclusive statutory review scheme.

The court of appeals apparently based its conclu-

sion that Transatlantic was not "bound" by the Commission's decision on the proposition that Transatlantic was not a "party" to the administrative proceeding (App. I, 51). While—as we shall discuss—that conclusion would have been wrong even if Transatlantic had not been represented before the Commission, that factual premise is inconsistent with what plainly appears in the record. In the petition for reconsideration Transatlantic filed with the Commission, it asserted in support of its right to petition that it had been represented in the administrative evidentiary proceedings through its agent (p. 7, note 8, *supra*). In support of its motion to intervene in the resumed district court proceedings, it alleged that the representation by its agent was inadequate, again acknowledging expressly that "at all times" prior to the filing of its petition for reconsideration with the Commission it "had been represented by counsel for" its agent (App. I, 27). It acknowledged further that its petition for reconsideration had been filed "in its own name and by its own counsel" (*ibid.*).

Even if Transatlantic was not formally a "party" to the Commission proceedings prior to its belated petition for reconsideration, it can hardly complain that it did not have its "day in court" in the face of its admission that its interests were represented at all times by counsel for its agent. The Commission determined that the tariff amendment was within the scope of the approved agreement, and an attempt to appeal that decision was not timely made. Transatlantic's decision to remain on the sidelines while its agent litigated the issues and lost should not be allowed to deprive the Commission's decision of effect

and put petitioners to the necessity of going through a costly and time-consuming redetermination of the same issues in a new forum. Cf., *e.g.*, *Safir* v. *Gibson*, C.A. 2, No. 34355, decided February 26, 1970, rehearing denied, June 18, 1970; *Oling* v. *Airline Pilots Assn.*, 346 F. 2d 270 (C.A. 7); *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga.).

Even if Transatlantic had in no way been represented in the proceedings before the Commission, that fact would not have entitled the district court (or the court of appeals on review of the district court) to ignore or review the Commission's decision. As to collateral review, there is nothing in the statutory language or scheme that makes the direct review procedures any less exclusive when the person seeking collateral review was not a party to the administrative proceeding. And any suggestion that an agency's exercise of its primary jurisdiction on a prior reference from a court can be ignored when a new party comes along (in the same or subsequent litigation) to raise the same issue is inconsistent with the entire concept of primary jurisdiction.

At the very least, a new presentation to a court of an issue previously considered by an agency should lead to a new reference to the agency, just as the earlier presentation did. But such repeated references of the same issue to the agency would ordinarily be wasteful, and this Court has recognized that there is no need for a reference if the agency involved has "in prior releases or opinions" given an answer to the question that would be referred. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 69. In such a

situation, it is clear, the court should follow the agency's decision *whether or not* the particular party to the lawsuit participated in the agency's proceeding leading up to the decision. The issue is not one of res judicata or collateral estoppel but—as this Court affirmed in *Western Pacific*—one of the "'allocat[ion of] the law-making power over certain aspects' of commercial relations", 352 U.S. at 65. The courts simply are not to decide certain kinds of questions (except on normal judicial review of agency action) and are obliged to seek out and follow the competent agency's decisions of those questions. In terms of the doctrine of primary jurisdiction, the advent of a new party in court would be pertinent only if his factual situation were materially different from that considered in the agency's decision; this is merely another way of saying that the agency's prior decision should be followed without a new reference only if it in fact answers the question presented to the court. But in any event, there is no suggestion in the instant case that Transatlantic's factual situation is in any way different from that of Shipping in general (which initiated the agency proceeding); thus, the Commission had already passed upon the precise question presented by Transatlantic's defense in the district court and on appeal.

There remains for consideration the wholly different question whether in the instant case there was a material change of circumstances following the Commission's order (*i.e.*, this Court's *Volkswagenwerk* decision) that undermined its continued validity. We have no doubt that there may occasionally

be situations in which a change in the law between the time of the agency's decision and the time when a court must apply it would make it appropriate for the court to make a new reference to the agency for reconsideration; the pertinent question would be whether the Commission would (or could properly) now give the same answer as before in the light of the intervening circumstances. But there is no such situation here, for two reasons: first, because Transatlantic did not act with due diligence to seek direct reconsideration by the Commission; and second, because there is nothing in *Volkswagenwerk* that required reconsideration. In any event, there was certainly no justification for the court of appeals to bypass the Commission completely, as it did, on a matter plainly within the Commission's primary jurisdiction. The most it could have done would have been to remand to the district court with instructions to stay the case again while the Commission reconsidered in the light of *Volkswagenwerk*.

With respect to any change in circumstances—whether in the law or in the facts—that might affect the validity of the agency's decision, the party asserting such a change has an obvious obligation to do so with reasonable diligence. Thus, for example, a party to an administrative proceeding has an obligation to assist the agency in making its initial decision on a current record, and equally he has an obligation to seek timely reconsideration by the agency if the new circumstances arise after its decision. He should not be allowed to forego opportunities to seek correction directly from the agency and then attack the

agency's decision when it is about to be applied by a referring court. Transatlantic's attack on the FMC decision in this case was accordingly properly rejected because of its failure to act before the Commission with such due diligence.

As we have described (pp. 6–7, *supra*), the *Volkswagenwerk* decision came in March 1968, some nine months after the FMC decision. However, Shipping took no steps to request the Commission to reconsider at any time, and Transatlantic did not do so until its petition for reconsideration in September 1968, almost six months after *Volkswagenwerk* and fifteen months after the Commission's decision. Understandably, the Commission rejected Transatlantic's petition as untimely, finding no "good cause" to waive the normal 30-day limitation under the circumstances.[13] Transatlantic sought no direct judicial re-

[13] Rule 16(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) provides: "Within 30 days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration." Rule 1(j) (46 C.F.R. 502.10) provides that such rules "* * * may be waived * * * in any particular case to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." Following the Commission's rejection of Transatlantic's petition on October 8, 1968 (App. II, 77), Transatlantic by letter of October 10 requested the Commission to consider whether "good cause" existed for the late filing in view of the fact that *Volkswagenwerk* was decided after the Commission's decision on the merits. By letter of December 2, 1968, the Commission through its Secretary replied as follows:

> At the time your petition was considered by the Commission, due consideration was given to your contention that good cause existed for filing the petition after the 30-day period specified in the Commission Rules of Prac-

view of this procedural action by the Commission pursuant to the exclusive applicable procedures for judicial review (see pp. 18–23, *supra*). If it had, it could have made any argument in the court of appeals on direct review that it now might seek to make as to an obligation by the Commission to allow reconsideration whenever there has been a material change in the facts or the law. But having let that opportunity pass, Transatlantic is now barred from asserting those arguments collaterally; the matter has already been determined against it. And in any event, we believe that the circumstances justified the Commission's determination that there was no good cause for reconsideration when Transatlantic tardily requested it. Thus, although the district court might have ordered a new reference to the Commission for reconsideration (if the new circumstances justified it, as we shall contend they did not) in the case of a new party, it properly did not in the case of Transatlantic, which had not only been represented at the original agency proceedings but had specifically been denied agency reconsideration for lack of diligence.

Even if Transatlantic's lack of diligence did not preclude an order for further reconsideration by the Commission, the nature of the "changed circumstances" that might be asserted make it plain that a

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tice and Procedure had expired. Nonetheless, the Commission determined that the petition was time[illegible]rred and directed that it be returned.

[This exchange of correspondence, which is contained in Docket 66-28, the official docket of the Commission proceeding here under consideration, is reprinted in Appendix B hereto, *infra*, pp. 53–55.]

further reference would be inappropriate. Before directing a further reference involving, as here, an alleged change in the law, the court would necessarily have to give some consideration to the possible effect of the change in the law on what the agency decided (just as a court must consider the merits of a question to some extent in deciding whether or not it is within an agency's primary jurisdiction in the first place). For the reasons we set forth in part II of the Argument, we believe that *Volkswagenwerk* did not undermine the Commission's decision on Shipping's complaint; therefore no further reference was necessary and the district court properly followed the Commission's earlier decision. In any event, *Volkswagenwerk* certainly did not so obviously negate the Commission's decision as to permit the court to overturn it without even allowing the Commission to reconsider; such action would be appropriate only in the rarest circumstances. At the very most, the court below had authority only to direct a further stay of the district court case pending agency reconsideration, which would then be subject to direct judicial review in the normal course.

II. THE TARIFF AMENDMENT CHANGING THE INCIDENCE OF STRIKE STORAGE CHARGES WAS WITHIN THE SCOPE OF THE BASIC CONFERENCE AGREEMENT AND DID NOT REQUIRE PRIOR APPROVAL BY THE COMMISSION UNDER SECTION 15

As we have shown in the preceding part of the Argument, the Court should reverse the decision of the court of appeals without reaching the merits of its

conclusion that Section 15 of the Shipping Act required Terminals' tariff amendment to be filed and approved by the Commission before it could become effective; at the most, the Court need only consider this issue in a preliminary way in order to satisfy itself (1) that the issue was indeed one within the Commission's primary jurisdiction, and possibly (2) that the *Volkswagenwerk* decision did not so change the applicable law as to require reconsideration of the Commission's earlier decision in this case. If, however, the Court should disagree with our view of the primary jurisdiction and judicial review questions, holding that the court of appeals did properly reach the merits of the Section 15 issue, it must then consider the propriety of the conclusion below on the merits. For the reasons that follow, we believe that the court of appeals misapprehended the merits.

A. CONVENTIONAL CHANGES IN TARIFFS AND RELATED REGULATIONS PURSUANT TO AN APPROVED BASIC CONFERENCE AGREEMENT DO NOT REQUIRE SEPARATE APPROVAL AS "AGREEMENTS" OR "MODIFICATIONS"

In the case of the ordinary conference subject to the Shipping Act, the members typically enter into an agreement by which they agree to act together in setting rates with respect to the subject matter of the agreement—in the instant case, the furnishing of marine terminal facilities and services (App. II, 5-6)—and agree to adhere to the rates (*id.*, 8, seventh) and to file them promptly with the Commission (*id.*, 7, sixth). In a literal sense, every schedule of rates, every tariff, is an agreement as to the rates reached by the members of the conference. And thus

every change in rates, no matter how routine, involves some kind of "agreement" or "modification" by the members.

The basic terms of Section 15 of the Shipping Act require advance Commission approval of "every agreement * * * or modification * * * thereof * * * fixing or regulating transportation rates * * *." Although this sweeping requirement—in effect since the Act was first enacted in 1916—was ultimately qualified in 1961 by an exception for tariff changes that we shall discuss shortly, it has never been susceptible of a literalistic reading, since such a reading would have imposed the impossible requirement that all of the many thousands of changes in conference tariffs agreed upon each year have the Commission's prior approval, with incalculable delays in their implementation.[14] The problem was confronted in Circuit Judge Fahy's opinion for the court in *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C.), certiorari denied, 368 U.S. 931, which (speaking before the exception was introduced in 1961) observed that

> * * * the problem is not solved by a literal reading of some of the language of section 15. It must be solved by considering this language with other provisions of the statute in the light

[14] There were filed with the Commission in each of the last two years a total of almost 300,000 tariff rate changes relating to foreign trade and terminal operations alone. See Annual Reports of the Federal Maritime Commission for 1969 at pp. 18, 31, and for 1968 at pp. 31, 45. The vast majority of these changes are undoubtedly filed by conferences operating under approved conference agreements.

> of a long legislative and administrative history. [291 F. 2d at 338.]

Judge Fahy found significant—and proper—the long and unbroken administrative construction of Section 15 to the effect that conventional changes in tariff rates contemplated by an approved conference agreement are not new agreements or modifications of the conference agreement and do not require separate prior approval under Section 15. *Id.* at 338–339. See *e.g., Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125; *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, 585–586. Noting that prior approval and indefinite suspension provisions would make the Shipping Act much broader than any federal rate regulatory statute, he was reluctant to conclude that Congress intended "a radical departure from its usual approach to [rate] regulation," which would make the statute "unworkable, unless approval were to be merely formal." 291 F. 2d at 339, and n. 8 at 339–340. Moreover, the application of such an across-the-board requirement would, *inter alia,* have obliterated the carefully drawn distinctions between domestic and foreign maritime trades. *Id.* at 340. Finally, Judge Fahy stressed that the Commission's longstanding interpretation of Section 15 had been directly brought to the attention of Congress on several occasions when related legislative questions were under consideration, and Congress had never seen fit to make changes in Section 15 as administratively interpreted. *Id.* at 340–341. He concluded that "[if] a different position is now to be adopted * * * it should be at the hands of Congress." *Id.* at 341.

In 1961, Congress did act. Far from adopting "a different position", it expressly excepted tariff rate changes and explanatory regulations made pursuant to an approved conference agreement from the basic Section 15 requirement, as follows:

> * * * [T]ariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.[14] [75 Stat. 762, 764, 46 U.S.C. 814 (1964 ed.).]

[14] Section 18(b), referred to in the proviso, in terms requires the filing of tariffs only by carriers and conferences of carriers. Hence it might be argued that the exception in the 1961 amendment for tariff filings under approved conferences was intended to apply only to these, and not to terminal conferences. The legislative history, however, reflects no intention to exclude rate changes and related regulations within the scope of *any* approved conference agreements, and there is no reason to apply a stricter standard for a terminal conference than for a carrier conference. The reference was limited to Section 18(b) apparently because there was no statutory or general regulatory requirement that terminal and terminal conference tariffs be filed until October 5, 1965, when the Commission required such filings by General Order 15 (46 C.F.R. 533). Prior to that time, conference terminal operators filed tariffs because the conference agreements, as approved, so required (See App. II, 7, Art. Sixth.)

At any rate, even if the exception in the 1961 amendment were not intended to relate to rates filed pursuant to approved terminal conference agreements, the holding of *Empire State* would apply, thus making unnecessary separate approval of tariff rates within the scope of the conference agreement. See *Agreement No. 9025, Dockage Agreement*, 8 F.M.C. 381, 384.

The amendment was apparently intended to codify the Commission's long and unbroken interpretation, thus allowing without prior filing and approval conventional tariff changes authorized by the basic agreement; it was not, however, intended to cover "new types of concerted activity not contemplated by the basic agreement." Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Cong., 1st Sess., 460–461. See also H. Rep. 498, 87th Cong., 1st Sess., 19–20, paras. (9)–(11); S. Rep. 860, 87th Cong., 1st Sess., 18; *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, 632, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 334 F. 2d 185 (C.A. 9); *Agreement 7700—Establishment of a Rate Structure,* 10 F.M.C. 61, 66, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 375 F. 2d. 335, 339–340 (C.A. D.C.).

Neither the judge-made rule reflected in *Empire State* nor its substantial codification in the 1961 amendment to Section 15 answers, of course, the question whether a particular conference action is merely a conventional tariff change within the scope of the underlying approved conference agreement or whether it is something more that should have prior Commission approval.[15] In *Empire State,* the court noted

[15] Obviously the general ratemaking authority under an approved conference agreement does not authorize all kinds of concerted activity relating in any way to rates. For example, the Commission and the courts have held variously that it does not authorize the establishment of an exclusive patronage system (sometimes called dual rates) which requires the shipper

the Commission's statement in its brief that "A tariff change and modification of the basic agreement may sometimes be a matter of degree." 291 F. 2d at 339. And, as we have noted, Congress made it clear that the 1961 amendment did not authorize agreements in areas not contemplated by the basic conference agreement to be implemented without prior Commission approval. The question, then, is whether the tariff amendment in question in this case—which is unquestionably in the general area governed by the exception and by *Empire State*—was sufficiently within the contemplation of Terminals' conference agreement. In the following sections we shall discuss this question and the further question of the impact of *Volkswagenwerk,* upon which the court of appeals relied so heavily.

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to employ the conference lines exclusively on pain of being charged higher rates otherwise (*Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C.A.D.C.), certiorari denied, 347 U.S. 990); or a tariff amendment to boycott brokers who deal with non-conference carriers (*Pacific Coast European Conference—Payment of Brokerage*, 4 F.M.B. 696, order enlarged on rehearing, 5 F.M.B. 65, and made permanent, 5 F.M.B. 225); or a device to impose a surcharge to finance an advertising campaign by a shipper's association (*Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.*, 9 F.M.C. 563); or a tariff amendment which inaugurates a port equalization system whereby carriers absorb certain inland freight expenses of the shipper (*Pacific Coast Port Equalization Rule*, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (C.A. 9); or a tariff change providing two levels of rates, one to apply if the cargo were carried on American flag vessels, and a second, lower rate if the cargo were carried on foreign flag vessels (*Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, affirmed *sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335).

B. THE COMMISSION'S DECISION THAT TERMINAL'S TARIFF AMENDMENT WAS WITHIN THE SCOPE OF THE APPROVED CONFERENCE AGREEMENT WAS REASONABLE AND SHOULD THEREFORE HAVE BEEN UPHELD

Congress created the Commission to provide a forum and arbitrator for the solution of the technical and complex matters involved in the shipping industry. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485; *Far East Conference* v. *United States*, 342 U.S. 570, 573–576; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. It committed to the agency's informed judgment wide latitude in formulating appropriate solutions to shipping problems, solutions which "frequently rest upon a complex and hard-to-review mix of considerations," *Consolo*, *supra*, 383 U.S. at 621; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303–304, and hence must be given due deference. *Ibid.*

These admonitions have special relevance to the question whether a particular tariff amendment falls within the authority granted by the Commission under an approved conference agreement. For this question turns largely on the Commission's expert knowledge of industry practices and the context in which its own approval had been given. The lower courts have therefore given the Commission "reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277, 281 (C.A.D.C.). While the issue is sometimes difficult to resolve, the line drawn by the Commission will be respected if its "reading of the basic agreement involved is a tenable one." *Persian Gulf Outward Freight*

*Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 342 (C.A.D.C.). See also *North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Commission*, 397 F. 2d 683, 685 (C.A.D.C.); *Trans-Pacific Freight Conf.* v. *Federal Maritime Commission*, 314 F. 2d 928, 935 (C.A. 9).

The Commission's reading in the instant case is plainly more than "a tenable one." The basic terminals agreement approved by the Commission relates to "rates * * * and charges * * * for furnishing * * * terminal facilities * * *" (App. II, 5). It authorizes the members to act together with respect to "wharf demurrage", *inter alia*, "and all services, facilities, rates, and charges incidental thereto * * *" (Art. Third, App. II, 6) and requires them to file with the Commission their "tariffs * * * and changes therein * * *" relating to wharf demurrage and the other matters covered by Article Third (Art. Sixth, App. II, 7). Terminals, being a link in the transportation chain between carriers and shippers, performs some terminal services for the carriers and others for the shippers, and must allocate the costs of providing these services as between the interests they serve. Indeed, it is obligated to insure that the charges it imposes for the services are properly allocated to the interest—cargo or vessel—for which they are rendered and which derives benefit from them.[16] The

[16] *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, affirmed *sub nom. California* v. *United States*, 320 U.S. 577; *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89; *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57; *Free Time and Demurrage Practices at New York Harbor*, 11 F.M.C. 238; *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525.

Commission, therefore, appropriately found that the authority to allocate the charges between vessel and cargo is comprehended within the authority to fix those charges generally, and no separate advance approval was required.[17]

It is highly pertinent that the determination that *prior* approval was not required by no means freed Terminals' decision to change the incidence of strike storage charges from Commission scrutiny and supervision. All tariff changes must be filed with the Commission and are subject to review either on complaint by an interested party or on the Commission's own motion; such review is to determine whether the amended tariff complies with the antidiscrimination provision of Section 16 of the Shipping Act (46 U.S.C. 815) and the reasonableness requirement of Section 17 (46 U.S.C. 816). Indeed, the Commission gave just such scrutiny to the strike storage allocation in its Report on reference from the district court in this case. And in addition, even if the tariff in question is within the contemplation of the basic conference agreement, the Commission may conclude upon further consideration that the agreement should be modified or approval withdrawn altogether. Thus, in the area of tariffs the fact that Section 15 is not directly appli-

[17] The fact that the conference agreement contains no authority in terms to assess "strike storage" (as the disputed charge was named after the shift in its incidence) as distinguished from "wharf demurrage" is not significant. The only distinction between the two is the interest which is required to pay the charge—the services and facilities offered being precisely the same—and the duty to apply the charge to the proper interest exists irrespective of nomenclature.

cable does not deprive the Commission of meaningful regulatory control appropriate to the situation.

Although prior cases have not dealt specifically with a shift in incidence as opposed to other types of tariff changes, they have involved broad changes in tariff provisions relating to rules and regulations beyond mere changes in the level of rates. Thus, in *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, the tariff changes in question "not only set forth the rates and charges, but define[d] the nature of the terminals' obligations, adopt[ed] rules with respect to their liability, describe[d] the conditions under which other persons might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded." (5 F.M.B. at 585). The Commission held that if rate changes were authorized by the agreement, so were the regulations and practices affecting them. *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, 585. See also the related case, *Empire State Highway Transp. Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336, 338 n. 2 (C.A.D.C.), certiorari denied, 368 U.S. 931. No reason appears for treating the shift in incidence differently from the rules and regulations involved in *Empire State.*

### C. THE COMMISSION'S DECISION IN THIS CASE WAS NOT UNDERMINED BY *VOLKSWAGENWERK*

The court of appeals based its conclusion that the tariff amendment required prior Commission approval upon its reading of this Court's opinion in *Volks-*

*wagenwerk, supra,* 390 U.S. 261. Considering that this Court has held that Section 15 must be read expansively, with exceptions only for "de minimis or routine" cases, the court of appeals concluded that both the Commission's administrative construction of the statute and *Empire State, supra,* had been completely overruled. We believe that this is a misapplication of *Volkswagenwerk.*

The dispute in *Volkswagenwerk* was not, as here, whether collective action, even if within the scope of an agreement previously filed and approved by the Commission, is a new agreement requiring additional approval. There, the issue was whether a particular agreement between carriers and terminal operators, by which they apportioned certain labor welfare costs to meet their obligations under a collective bargaining agreement, had to be filed at all under Section 15. That agreement was in no way even arguably contemplated by any previously filed agreement, and indeed there was no kind of conference agreement of any kind involving all the parties to the agreement. The agreement in question was not reflected in any tariff or other document filed with the Commission—as the amendments here in question were from the start. Thus, the question in *Volkswagenwerk* was whether the "cooperative working agreement" involved was an agreement of the kind that Congress meant to subject to direct Commission supervision. In contrast, there is no question—as we have shown—of the Commission's direct supervision over the type of matter involved in the instant case; the only question is as to the mode of such supervision—that

is, whether the tariff amendment, although contemplated by the basic agreement as already approved by the Commission, is a new agreement or modification requiring further specific approval. The difference between these types of situations is crucial to the administration of the Shipping Act.

To put the matter another way, the purpose of Section 15 is to assure that certain kinds of concerted activities in the shipping industry are not carried out without prior consideration by the Commission to determine that they are not "unjustly discriminatory or unfair", "to the detriment of the commerce of the United States", "contrary to the public interest" or otherwise in violation of the Shipping Act. In *Volkswagenwerk,* the lack of any filing on the subject of allocation of labor welfare costs had deprived the Commission of any opportunity to consider what allocation of these major charges on a continuing basis would best comport with the standards of the Act or how that allocation should be decided upon. Here, on the other hand, the Commission had considered the manner in which wharf demurrage charges would be fixed when it considered Terminals' basic agreement in 1962, and had thereby authorized Terminals to provide for strike storage charges by means of conventional tariff filings subject to Commission review in the normal course under Sections 16 and 17 of the Act. We do not suggest that anything that can be put in tariff form may be implemented without prior Section 15 approval (see pp. 35–36, note 15, *supra*). Rather, the question is whether the matter in question is one within the original contemplation of the

approved agreement; for the reasons given in the preceding section we believe that the Commission properly regarded strike storage charges and their incidence as within the scope of the 1962 Terminals agreement. And there is nothing in *Volkswagenwerk* (which did not involve or discuss the Section 15 exception for tariff changes) that undermines this principle.

## CONCLUSION

For the alternative reasons set forth in parts I and II of the Argument, the judgment of the court of appeals should be reversed and the judgment of the district court should be reinstated.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

RICHARD W. MCLAREN,
*Assistant Attorney General.*

JAMES VANR. SPRINGER,
*Deputy Solicitor General.*

GREGORY B. HOVENDON,
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JAMES L. PIMPER,
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EDWARD G. GRUIS,
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GORDON M. SHAW,
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*Federal Maritime Commission.*

JULY, 1970.

## APPENDIX A

1. Administrative Orders Review Act of 1950, 64 Stat. 1129, reenacted and recodified in 1966 as 28 U.S.C. 2341, *et seq.* (1964 ed., Supp. IV.):

§ 2341. Definitions.

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

§ 2342. Jurisdiction of court of appeals.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§ 2343. Venue.

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

§ 2344. Review of orders; time; notice; contents of petition; service.

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

* * * * *

§ 2347. Petitions to review; proceedings.

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

§ 2348. Representation in proceeding; intervention.

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

§ 2349. Jurisdiction of the proceeding.

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals

shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

§ 2350. Review in Supreme Court on certiorari or certification.

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

* * * * *

2. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814 (1964 ed.), provides in pertinent part as follows:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

## APPENDIX B

GALLAND, KHARASCH, CALKINS & LIPPMAN,
ATTORNEYS AT LAW,
*October 10, 1968.*

[Formal parts omitted]

Re: Docket 66-28—Petition of Swedish Transatlantic Line for Reconsideration.

FEDERAL MARITIME COMMISSION,
*1321 H. Street, N.W.,*
*Washington, D.C. 20573.*
(Attn: Mr. Thomas Lisi).

GENTLEMEN: This acknowledges Mr. Lisi's letter dated October 8, 1968 stating that, at the Commission's direction, he was returning the above-designated petition for reconsideration for the following reason:

"Inasmuch as the petition was not filed within the period specified in the Commission's Rules of Practice and Procedure, it is time barred."

Your attention is respectfully directed to Rule 16(d) (46 C.F.R. 502.264) of the Commission's Rules of Practice and Procedure which provides as follows:

"Except for good cause shown and upon leave granted, petition to re-open under Rule 16(b) shall be filed with the Commission within thirty (30) days after the date of service of the Commission's final decision or order in the proceeding, unless a shorter period is fixed under Rule 7(c)."

Paragraph 9 of the above-designated petition for reconsideration cited this Rule and urged that petitioner had "good cause" within the meaning of this

Rule for filing its petition after the 30-day period had expired. No mention is made of this contention, and the October 8 letter rejecting the petition makes no finding on whether or not good cause existed for not meeting the 30-day deadline.

Indeed, it appears clear that the rejection of the petition was not contingent upon an automatic application of the 30-day period. The petition was filed on September 4th, but the Commission did not reject it until October 8th. Surely, 34 days is not required to determine whether a pleading is time barred. Furthermore, by letter dated September 17, 1968, the respondent Port of Boston Marine Terminal Association filed a reply to the petition for reconsideration; the reply was rejected by the Commission on September 19, 1968 for the reason that the Commission's Rules do not allow the filing of a reply to a petition for reconsideration unless the Commission grants reconsideration. The September 19 Commission letter did not state that the petition for reconsideration was time barred. If it was not time barred on September 19, no reason appears why it would be time barred on October 8.

Petitioner submits that the October 8 letter stands in violation of Rule 16(d) of the Commission's Rules of Practice. Petitioner respectfully requests that the Commission consider the petition at least to the extent of initially deciding whether, under paragraph 9 of the petition, good cause has been shown within the meaning of Rule 16(d) of the Commission's Rules of Practice and Procedure for not filing the petition within 30 days after the Commission's decision was served. Enclosed herewith is a copy of the original petition which was returned to us with the October 8 letter.

Sincerely,

AMY SCUPI.

DECEMBER 2, 1968.

Mrs. AMY SCUPI,
*Galland, Kharasch, Calkins & Lippman, Attorneys At Law, 1824 R Street, N.W., Washington, D.C. 20009*

DEAR MRS. SCUPI: Reference is made to your letter of October 10, 1968, regarding your petition for reconsideration of the Commission's decision in Docket 66-28.

At the time your petition was considered by the Commission, due consideration was given to your contention that good cause existed for filing the petition after the 30-day period specified in the Commission Rules of Practice and Procedure had expired. Nonetheless, the Commission determined that the petition was time-barred and directed that it be returned.

I am returning the petition which accompanied your letter of October 10, 1968.

Very truly yours,

THOMAS LISI,
*Secretary,*
[*Federal Maritime Commission*].

U.S. GOVERNMENT PRINTING OFFICE: 1970